



REPUBLIC OF KENYA



KENYA LAW
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Parbat Siyani Construction Limited v Bob Morgan Security Services Limited (Civil Suit 301 of 2015) [2022] KEHC 3240 (KLR) (Civ) (30 May 2022) (Judgment)

Neutral citation: [2022] KEHC 3240 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL SUIT 301 OF 2015**

JK SERGON, J

MAY 30, 2022

BETWEEN

PARBAT SIYANI CONSTRUCTION LIMITED PLAINTIFF

AND

BOB MORGAN SECURITY SERVICES LIMITED DEFENDANT

JUDGMENT

1. The plaintiff herein lodged a suit against the defendant vide the plaint dated August 31, 2015 and sought for the following reliefs arising out of a claim for breach of contract:
 - a) Special damages in the sum of Kshs.10,322,375/=.
 - b) Costs and interest on (a) at court rates.
 - c) Such further or other reliefs as may deem just to this Honourable Court.
2. The plaintiff pleaded in the plaint that sometime in the year 2012 it had contracted the services of the defendant, where it had engaged the defendant to provide security guards to keep watch over its construction site known as Riverside Park Phase 2 (“the subject premises”) and that it was a term of the contract that the defendant would provide the plaintiff with 2 day and 3 night guards respectively.
3. The plaintiff further pleaded in the plaint that in the course of the contract between the parties, it lost various goods situated at the subject premises, resulting from the negligence on the part of the defendant’s employees/agents, the particulars of which are set out under paragraph 6 of the plaint.
4. The plaintiff also particularized the loss suffered, under paragraph 7 of the plaint, totaling the sum of Kshs.10,322,375/=.



5. Upon service of summons, the defendant entered appearance and put in its statement of defence dated 9th November, 2015 and amended on May 9, 2016 to deny the allegations made in the plaint.
6. More specifically, the defendant while admitting to the existence of the contractual agreement between the parties, pleaded that the same was terminated sometime in April, 2013.
7. The defendant further denied that the goods owned by the plaintiff were lost under the watch of its employees and therefore denied the particulars of negligence and loss set out in the plaint.
8. It is pleaded in the statement of defence that if at all the defendant is found to be liable, then such liability ought to be limited to the amount set out in the contract.
9. At the hearing, the plaintiff summoned two (2) witnesses. On its part, the defendant called one (1) witness.
10. Daniel Musau who was PW1 adopted his executed witness statement as part of his evidence and further produced the plaintiff's list and bundle of documents as P. Exhibits 14-294 and the supplementary list and bundle of documents as P. Exhibits 295-312.
11. The witness gave evidence that he worked for the plaintiff at all material times as a Security, Safety and Preventive Manager, upon his employment on 1st July, 2012.
12. It is the evidence of the witness that the plaintiff engaged the security services of the defendant while the project at the subject premises was ongoing and that upon taking an inventory of the materials situated on the subject premises, the plaintiff's employees noted that some of them were missing from the site.
13. It is also the evidence of the witness that consequently, the plaintiff's agents decided to undertake an audit in which the defendant was represented and the latter was held liable in the end, since its employees were in charge of ensuring all the materials in the subject premises were safe at all material times.
14. In cross-examination, PW1 stated that the subject premises had only one (1) gate and that the guard at the main gate would confirm the materials entering the subject premises together with the General Manager and the storekeeper, and that the three (3) of them would then sign for the delivery of the materials.
15. PW1 further stated that a second guard was placed on the subject premises to ensure the security of the premises while a third guard would be placed at the rear of a separate building to ensure that no employees or other persons got rid of the materials by throwing them on the other side of the fence.
16. The witness stated that the plaintiff would use two (2) guards at night, who would be assigned the responsibility of patrolling the first and second buildings both situated on the subject premises.
17. The witness testified that the General Manager and the storekeeper; who usually stayed overnight on the subject premises; were also employees of the defendant and that no materials could leave the premises without being countersigned by the two (2) abovementioned persons, and the security guard stationed at the time.
18. The witness further testified that the matter was reported to the police and that the police abstract which was issued pointed to a possible theft, though at the time of giving his testimony, investigations were still ongoing.



19. It is the evidence of PW1 that the contract between the parties herein commenced on September 27, 2012 before terminating on April 29, 2013; and that in the years between 2011 and 2012, there were two (2) other security firms situated on the subject premises.
20. PW1 gave evidence that it was procedure for a theft report to be filed on a weekly basis, whether or not a theft occurred.
21. The witness stated that prior to the materials leaving the subject premises, they had to be accompanied by a delivery note which would then be confirmed by the security guards at the premises at any given time; and upon being further cleared by the storekeeper and the tally guard who would countersign the delivery note.
22. In re-examination, PW1 testified that the materials entering and leaving the subject premises usually followed a particular documentation process but that the missing materials did not follow that process, and yet it was the duty of the tally guard to ensure that the process was followed to the letter.
23. PW1 also testified that following the incident of theft, the defendant's representative was invited to the audit and was also permitted to carry out their own investigations, following which they were to forward a copy of their report to the plaintiff but that they did not.
24. Bipin Maru who was PW2 also adopted his signed witness statement as evidence and stated that the missing materials as indicated on the schedule which was tendered in evidence include scaffolding and cross-bars.
25. The witness also stated that the missing materials had been delivered onto the subject premises but could not be traced thereafter.
26. In cross-examination, the witness gave evidence that he worked as the site coordinator of the construction project being undertaken at the subject premises at all material times and that the defendant came on board on September 19, 2012, providing the plaintiff with three (3) day guards and two (2) night guards, before gradually increasing the number of guards to five (5) owing to some security concerns.
27. It is the evidence of the witness that he does not have the records of the exact date on which the materials in question went missing.
28. The witness stated that the General Manager and foreman who would need to sign on the delivery notes in order for any materials to leave the subject premises were employees of the plaintiff.
29. In re-examination, it was the testimony of PW2 that the material delivery notes bore four signatures, including those of the General Manager, storekeeper and tally guard, and that the said delivery note was signed during an outgoing delivery from the subject premises.
30. It is also the testimony of PW2 that in the absence of a duly signed delivery note, the guard at the gate would not be authorized to release any goods out of the subject premises.
31. Dennis Michieka who was DW1 adopted his signed his witness statement as evidence and the defendant's list and bundle of documents as exhibits, before stating that he worked for the defendant as its Chief of Staff at all material times.
32. In cross-examination, the witness testified that the defendant provided security services to the plaintiff from 19th September, 2012 and that it was not the duty of the defendant's employees to authorize any materials leaving the subject premises; rather, their responsibility was simply to confirm whether



authority had been given in form of a pass and to also ensure that security procedures have been followed.

33. It is the testimony of the witness that it was a representative of the plaintiff who would sign the pass.
34. It is also the testimony of the witness that he is aware of a complaint having been made in respect to lost goods.
35. In re-examination, DW1 stated that there is no indication as to when the missing goods are alleged to have left the subject premises.
36. Upon close of the hearing, parties were directed to put in written submissions.
37. In its submissions dated 1 November 9, 2021 the plaintiff argues that the evidence tendered on its behalf is uncontroverted by the defendant and that in one of the letters tendered, the defendant acknowledges the loss and further acknowledges that its guards are to blame.
38. To buttress its point above, the plaintiff refers this court to the case of *Gen Cargo (Transport) Limited v Texas Alarm (K) Limited* [2016] eKLR where the court held thus:

“The failure to perform the very purpose of the contract is to this court a matter that goes to the root of the same contract and it would be contrary to the notion of fairness, reasonableness and therefore justice to exonerate the Defendant merely because their standard contract limited or ruled out their liability. For the payment they received they owed a duty which I have found was breached and for that breach the Defendant must be liable.”

39. In the end, it is the submission of the plaintiff that in failing to meet its obligations in accordance with the contract, the defendant ought to found liable for the loss that resulted therefrom.
40. In response, the defendant by way of its submissions dated 7th December, 2021 contends that the plaintiff has not brought any evidence to show that the employees of the defendant had permitted the removal of any materials from the subject premises without a gate pass.
41. The defendant also contends that the plaintiff has not specified the dates on which the alleged thefts took place and that the theft forms which have been adduced as exhibits relate to timelines before the parties herein entered into a contract.
42. It is the submission by the defendant that any loss visited upon the plaintiff cannot therefore be attributed to negligence on its part, in the absence of any evidence to support that claim.
43. Consequently, the defendant is of the view that the plaintiff has not proved its case against it and is therefore not entitled to the reliefs being sought in the plaint, adding that special damages where sought must be specifically pleaded and strictly proven, as stated by the Court of Appeal in the case of *Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited v Janevams Limited* [2015] eKLR thus:

“This Court has consistently held that it is trite law that special damages must be specifically pleaded and proved. In the case of *Hahn v Singh* 1985 Kenya Law Reports 716, this Court stated thus:-

“...special damages which must not only be claimed specifically but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty of certainty and particularity of proof required depends on the circumstances and the nature of the act themselves.”



44. The defendant further submits that should this court find in favor of the plaintiff, then the liability visited upon the defendant should not exceed the sum of Kshs.10,000/= pursuant to the contract.
45. I have considered the evidence tendered in court and the contending submissions filed plus the authorities cited, and I have identified the following as the key issues for determination:
 - i. Whether the plaintiff has proved its claim for negligence against the defendant; and
 - ii. Whether the plaintiff is entitled to the reliefs sought in the plaint.
46. To address the first issue, upon my examination of the pleadings and evidence collectively, it is not in dispute that the parties herein had entered into a contract for the provision of security services on 24th September, 2012 until the termination thereof on 29th April, 2013.
47. Upon my examination of the evidence, it is apparent that prior to the defendant coming on board to provide security services to the plaintiff and even shortly thereafter, there had been other incidences of theft recorded in the theft forms. It is noteworthy that at this time the plaintiff had been engaging various other security service providers during those times.
48. That notwithstanding, upon my examination of the record, I note that the plaintiff tendered theft forms dated 25th March, 2013 which list the various materials that are listed as having gone missing from the subject premises and during which time the defendant's employees had been assigned to guard the subject premises.
49. Further to the foregoing, it is apparent that reports of theft were made at all material times and the defendant has not brought any credible evidence to challenge this position.
50. Upon my study of the record, I observed that the police abstract dated March 26, 2013 and adduced as an exhibit indicated that the report of a theft had been made on 26th March, 2013. However, the police abstract did not indicate who was to blame or in any other manner indicate the findings of the investigations; if any. It is apparent from the record that no arrests were made in relation to the theft.
51. Upon my further study of the record, I observed that when it came to the issue of the delivery notes which determined the materials that left the subject premises, the evidence tendered indicates that the same required three (3) signatories, including two (2) employees of the plaintiff and a guard hired by the defendant.
52. The evidence tendered also shows that no materials could leave the premises unless and until confirmation of release had been given.
53. It is not in dispute that at all material times the employees of the defendant were on the subject premises and hence owed a duty of care to ensure the safety of the subject premises and all goods/materials therein.
54. In addition, I considered the testimony by the plaintiff's witnesses stating that the missing materials did not follow the proper documentation process and hence the only plausible explanation is that they disappeared while under the care of the defendant's employees. In the absence of any credible evidence to the contrary, I find this position to be more plausible than not.
55. The plaintiff tendered evidence to show that upon realizing that the materials in question had disappeared, its agents notified the defendant of the theft and general dissatisfaction with the services being offered by the defendant, and later went ahead to carry out an audit, but that the defendant did not itself undertake a separate audit or present its report on the same separately. This position has not been countered by the defendant through any credible evidence.



56. More importantly, I note from the evidence adduced that the defendant; by way of the correspondence dated 7th March, 2013; essentially acknowledged that the security challenges being experienced at the time were the result of an improper security survey prior to deployment of the guards and that those found to have been responsible for the thefts in question would be held accountable.
57. In view of the foregoing circumstances, I am of the view that the defendant owed the plaintiff a duty of care in respect to ensuring the security of the subject premises and that there was a breach of that duty of care, resulting in loss to the plaintiff.
58. I am therefore satisfied that the plaintiff has proved its claim for negligence against the defendant on a balance of probabilities and I hereby enter a finding of 100% liability against the defendant.
59. Concerning the second issue for determination touching on the reliefs sought by the plaintiff, from the pleadings and record, it is clear that the plaintiff sought for special damages in the sum of Kshs.10,322,375/=.
60. It is trite law that special damages must be specifically pleaded and strictly proved, as seen in the case of *Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited v Janevams Limited* [2015] eKLR cited in the submissions by the defendant, where Court of Appeal pronounced itself in the manner hereunder:
- “This Court has consistently held that it is trite law that special damages must be specifically pleaded and proved. In the case of *Hahn v Singh 1985* Kenya Law Reports 716, this Court stated thus:-
- “...special damages which must not only be claimed specifically but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty of certainty and particularity of proof required depends on the circumstances and the nature of the act themselves.”
61. Upon my examination of the pleadings and record, I observed that the plaintiff provided a list/schedule of the materials that are said to have been stolen, totaling the sum of Kshs.10,322,375/=.
62. Upon my further examination of the pleadings and record, I observed that according to the contract entered into between the parties herein, Clause 11 concerned limitation on liability.
63. From my reading of the same, I find the last part of the clause to be the most applicable to the present circumstances, where liability is limited to the sum of Kshs.3,000,000/= or the value of the property insured but not mentioned in the agreement, whichever is less.
64. Upon considering the foregoing circumstances coupled with the fact that a contract is a binding agreement between the parties to it, I will award the plaintiff the sum of Kshs.3,000,000/= under this head.
65. In the end therefore, judgment be and is hereby entered in favor of the plaintiff and against the defendant on liability. The plaintiff is awarded Kshs.3,000,000/= being special damages The aforesaid amount to attract interest at court rates from the date of filing suit until full payment. The plaintiff to also have costs of the suit.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 30TH DAY OF MAY, 2022.

J. K. SERGON

JUDGE



In the presence of:

.....for the Plaintiff

.....for the Defendant

